No. 96

IN THE

Supreme Court of the United States

October Term, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, CAROLINE K. SIMON, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

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Opinion Below

The three separate opinions of the three-judge District Court (Appendix A, *infra*) are reported at 211 F. Supp. 460.

Jurisdiction

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. On November 26, 1962 the Court entered a judgment dismissing the complaint. A Notice of Appeal was filed in the District Court on January 23, 1963 (R. 531-33). Jurisdiction of this Court to review the judgment below is conferred by 28 U. S. C. § 1253.

Questions Presented

1. Whether appellants sustained their burden of proving that the portion of Chapter 980 of the 1961 Laws of the State of New York which delineates the boundaries of the Congressional districts in Manhattan Island segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.

2. Whether a statute which segregates persons by race or place of origin may be declared constitutional on the ground (a) that no proof of specific harm to the individuals subject to the statute has been adduced at trial or (b) that the segregation is benign in its effect.

3. Whether plaintiffs attacking the constitutionality of a state statute must, in addition to proving that the statute has the demonstrable effect of segregating persons by race or place of origin, also prove that the "motive" of the legislature was to produce that effect.

4. Assuming, *arguendo*, that both effect and motive must be shown (a) whether plaintiffs' burden of proof is greater than that required in the usual civil case, and (b) whether a court may sustain the constitutionality of the

statute by inferring an alternative legislative motive regarding which there is no evidence in the record and which is not a proper subject of judicial notice.

Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are the Fourteenth and Fifteenth amendments to the United States Constitution, 2 U. S. C. § 2(a), 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343, 2201, 2202 and 2281, and Chapter 980 of the 1961 Laws of New York. The pertinent provisions of 2 U. S. C. § 2(a) and Chapter 980 are set forth in Appendix B, *infra*.

Statement

On November 9, 1961, the Joint Legislative Committee on Reapportionment recommended to an extraordinary session of the New York State Legislature a statute redrawing the boundaries of the Congressional districts of the state in accordance with the 1960 Federal census, as required by 2 U. S. C. § 2(a), *New York State Legislative Document* No. 45 (1961), set forth in Appendix B, *infra*. No hearings were held and no debates recorded, and the statute was passed without change and signed by the Governor on the next day. N. Y. Sess. Laws, Extraordinary Sess. 1961, c. 980 §§ 110-12.

On July 26, 1962, appellants filed a civil complaint pursuant to the Civil Rights Act, 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. § 1343, in which they challenged that portion of the statute which delineates the boundaries of the four Congressional districts which are wholly contained in, and comprise all of the districts in, New York County (the island or borough of Manhattan). Appellants are residents and registered voters in each of these four districts. The appellees named in the complaint are various state and city

officials charged with the administration of the statute. The complaint alleges that the challenged portion of the statute segregates eligible voters in Manhattan on the basis of race and place of origin in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment. The complaint seeks a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional and restraining the defendants in the enforcement thereof and, in the event such declaration does not lead to corrective legislation, additional equitable relief.

On July 31, 1962, on motion of appellants and after hearing, Feinberg, *D.J.* determined that a three-judge court should be convened pursuant to 28 U. S. C. §§ 2281 and 2284.

At the opening of the trial before the three-judge court, Adam Clayton Powell, the then incumbent Congressman from the pre-1961 18th Congressional District, and five other individuals, alleging *inter alia* that "Negroes and Puerto Ricans now control" one of the four districts in Manhattan, which might be affected by a judgment in the case, were permitted to intervene as defendants.

During the trial, appellants presented evidence in the form of charts, statistics and expert testimony, showing the boundaries of the four districts in Manhattan and the white and non-white and Puerto Rican* population** within

*The non-white and Puerto Rican classification derives from the U. S. Census breakdown (R. 52-54) and the classification used by New York City agencies. See N. Y. C. Board of Education, *Toward Greater Opportunity*, 155 (1960). Puerto Ricans in New York City are "an easily identifiable group [requiring] the aid of a Court in securing equal treatment under law . . ." *Hernandez* v. *Texas*, 347 U. S. 475, 478 (1954).

**Total population rather than eligible voters, residents, or other classification, was selected because the Constitution and Congress require Congressional districting on the basis of total population. U. S. Constitution Art. I, § 3; Fourteenth Amendment § 2; 2 U. S. C. § 2(a).

those boundaries. Certain of appellants' trial exhibits are set forth in Appendix C.*

Appellants' evidence showed that the number of Congressional districts in Manhattan was reduced by the 1961 statute from 6 to 4, thus requiring a redrawing of boundaries and an increase in the population of the remaining four districts. Appellants' uncontroverted evidence also showed as follows:

—The total population of Manhattan Island is 37.7% non-white and Puerto Rican (Pltfs.' Exh. 3).

—The first of the four districts drawn by the statute (the 17th) contains a population which is 94.9% white non-Puerto Rican, was carved out of the center of the Island, has an irregular 35-sided configuration and is the least populous of the four districts (Pltfs.' Exhs. 2B and 3).

—The next district drawn by the statute (the adjacent 18th) contains a population which is 86.6% non-white and Puerto Rican and is the second least populous district (Pltfs.' Exh. 3).

—The boundary between the 17th and 18th is a 13-sided step-shaped configuration which fences a maximum number of non-whites and Puerto Ricans out of the 17th and into the 18th (R. 99-108).**

*It should be noted that Pltfs.' Exh. 4 does not precisely reflect the racial distribution around the borders of the 17th District. The shadings in the Exhibit cover entire census tracts, whereas the boundaries of the 17th cut through 16 such tracts. As shown by the testimony, most of the non-whites and Puerto Ricans in the cut tracts are excluded from the 17th (R. 95-121).

**One exception is an area retained in the 18th containing 10,507 persons, of whom less than 4.9% are non-white and Puerto Rican. However, a public housing project, authorized in May of 1959, is now being constructed in this area (Pltfs.' Exh. 7). Such projects in New York City have an average non-white and Puerto Rican occupancy of 73.4% (Pltfs.' Exh. 7).

—The remaining two districts, which fill out the rest of the Island, are approximately equal in total population and racial composition, each containing just over 70% white non-Puerto Ricans and just under 30% non-whites and Puerto Ricans (Pltfs.' Exh. 3).

—The boundaries of these remaining two districts are drawn so as to maximize the predominantly white non-Puerto Rican character of the 17th and the non-white and Puerto Rican character of the 18th (R. 108-119 and Pltfs.' Exhs. 4, 4A and 4B).

—The 17th could not be expanded in any direction so as to make it reasonably equal in population to the other districts, nor could its boundary lines be significantly straightened, without incorporating heavy concentrations of non-whites and Puerto Ricans (R. 99-119 and Pltfs.' Exhs. 4, 4A and 4B).

—All but 3.1% of the Island's non-whites and Puerto Ricans are included in districts in which their votes are 12-15% less valuable than those of the residents of the 17th (Pltfs.' Exh. 3).

—As a result of the three redistricting acts since 1911, the 17th has been altered from a rectangular configuration to its present 35-sided irregular shape (Defts.' Exhs. C-H, R. 595-600).

—The two geographical areas added to the 17th by the 1961 statute were the two remaining areas in Manhattan with the highest concentrations of white non-Puerto Rican population, an average of approximately 98% (R. 123-25 and Pltfs.' Exh. 4B).

—In adding one all white non-Puerto Rican housing project (Stuyvesant Town) to the 17th, an adjacent area containing a non-white Puerto Rican population

of 12.2% was omitted, thus leaving an inexplicable loop in the boundary of the 17th and increasing its irregular configuration* (R. 143-44 and Pltfs.' Exh. 4B).

—The one area dropped from the 17th by the 1961 statute was the area of highest concentration of non-whites and Puerto Ricans (44.5%) remaining in the district at the time of the adoption of the statute (R. 139-40).

—The new 17th created by the 1961 statute contains almost 50% more persons than the old 17th, but the percentage of non-whites and Puerto Ricans in the district was reduced from 6.6% to only 5.1% (R. 123, 179-80).

—None of three hypothetical divisions of the Island into four districts on a logical basis, using natural boundaries or well known streets and avenues, produce concentrations of whites on the one hand and Negroes and Puerto Ricans on the other which even approach the concentrations achieved by the statute (Pltfs.' Exh. 6 and R. 142-48).

At the close of appellants' case, no evidence was offered either by the appellee state officials or by the intervening appellees. The appellee state officials alleged no affirmative defenses. The intervening appellees failed to introduce evidence in support of the affirmative defenses alleged in their pleading, and, because there was no evidence in the record to support them, the court below refused to consider

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*Stuyvesant Town is 99.5% white non-Puerto Rican (R. 124-25 and Pltfs.' Exh. 4B) under sanction of the decision in *Dorsey* v. *Stuyvesant Town*, 299 N. Y. 512 (1949).

or to pass upon these alleged defenses. (Appendix A, *infra*, pp. 22a-23a).

In dismissing the complaint, the three-judge court divided two to one, and each of the judges filed a separate opinion.

Judge Moore took the position that racially segregated voting districts are constitutional, at least absent a showing of serious underrepresentation or other specific harm to the individuals concerned. He stated that plaintiffs "must show more than a mere preference to be in some other district and associated for voting purposes with persons of other races or other countries of origin". (*Id.* pp. 10a-11a) and noted that "plaintiffs have not even shown that their voting status will be changed in any way" (*Id.* at p. 15a).

Judge Moore also took the position that segregated voting districts could be constitutionally justified, or even constitutionally required, because they may enable persons of the same race or place of origin "to obtain representation in legislative bodies which otherwise would be denied to them" (*Id.* at p. 17a).

Even if segregated voting districts could violate the Constitution, Judge Moore was of the opinion that they could be unconstitutional only if the legislature's "motive" was to create such districts; that plaintiffs must introduce proof of this "motive"; and that, in this case, no such proof was tendered by the plaintiffs (*Id.* at pp. 4a, 10a, 11a, 14a, 15a).

Judge Feinberg disagreed with Judge Moore's view that segregated voting districts are constitutional absent a showing of specific harm, stating that the "constitutional vice [is] the use by the legislature of an impermissible standard and the harm to plaintiffs that need be shown is only that such a standard was used" (*Id.* at p. 18a). Judge Feinberg also disagreed with the view that segregated districts

could be constitutionally justified by alleged advantages to persons of a particular race or place of origin. In Judge Feinberg's opinion, the Constitution is "color-blind," and "good" segregation is as repugnant as "bad" segregation (*Id.* at p. 20a).

However, Judge Feinberg agreed that plaintiffs must show a legislative "motive" or "intent" to segregate as a prerequisite to a finding of unconstitutionality (*Id.* at pp. 20a, 23a). Moreover, Judge Feinberg believed that plaintiffs have a "difficult burden" to meet in attacking the constitutionality of a state statute (*Id.* at p. 20a), and that plaintiffs had not sustained their "difficult burden" of proving an unconstitutional legislative motive in this case. Although plaintiffs' evidence, in his view, "might justify" a finding of a legislative motive to segregate, he rejected such a finding on the ground that "other inferences. . . . are equally or more justifiable" (*Id.*) The only such inference specifically cited by Judge Feinberg was that the legislature intended to classify persons by "social and economic background," (*Id.* at p. 24a), an inference regarding which there was no evidence whatever.

In his dissent, Judge Murphy agreed with Judge Feinberg as to the applicable constitutional standards. But on his view of the record, the plaintiffs carried their burden of proving that "the legislation was solely concerned with segregating white and colored and Puerto Rican voters by leaving colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (*Id.* at p. 28a); that the legislation had effected "obvious segregation"; and that the statute constituted a "subtle exclusion" of Negroes from the 17th and a "jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors" (*Id.* at 32a). Accordingly, Judge Murphy thought plaintiffs had met their burden of proving segregation within *Hernandez* v. *Texas*, 347 U. S.

475, 479-81 (1954), and, in the absence of any proof by defendants or intervenors, were entitled to a judgment declaring the statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Questions Presented Are Substantial

The judgment and opinions below reflect an impermissible reading of the record in this case as well as the application of novel and improper Constitutional standards. If allowed to stand, unreviewed by any appellate court, they will not only continue the segregated pattern of political life in Manhattan and leave legislatures everywhere virtually free from Constitutional restraint in the creation of segregated voting districts, but they will also establish undesirable precedents and create confusion in segregation cases generally. Specifically, the judgment and opinions below (a) would permit unbridled segregation unless specific harm to the individuals involved could be shown, (b) would sustain segregation deemed to have a benign effect or to be prompted by an alternative legislative "motive", (c) would impose a virtually unachievable standard of proof upon plaintiffs in segregation cases, and (d) would permit courts to uphold segregation statutes by drawing inferences completely outside the record.

1. The record in this case, which may be reviewed *de novo* here,* clearly shows that the challenged portion of the

*The court below made no findings of fact. The facts are so "intermingled" with the law that *de novo* review is warranted under *Norris* v. *Alabama*, 294 U. S. 587 (1935) and *Watts* v. *Indiana*, 338 U. S. 49 (1949). Moreover, the critical facts in the record are in documentary rather than testimonial form and, because witness demeanor is thus immaterial, may be reviewed *de novo* here, *Orvis* v. *Higgins*, 180 F. 2d 537, 539 at n. 6 (2d Cir. 1950), *cert. den.* 340 U. S. 810. Especially since this Court is the only appellant tribunal which may review the record, *de novo* review is warranted.

statute segregates voters by race and place of origin. The legislation has carved out of the middle of Manhattan Island one virtually all-white district and one virtually all non-white and Puerto Rican district. Without further shrinking the already under-sized 17th and 18th districts, the legislature could not have drawn the district lines so as to create a more segregated pattern—that is, a single district with a higher percentage of white non-Puerto Ricans (94.9%) and another with a higher percentage of non-whites and Puerto Ricans (86.6%).

The record thus shows, as Judge Murphy found, (a) that segregation exists in fact and (b) that this segregation was purposefully created by the legislature—assuming such purposefulness is an issue in the case, which appellants deny, *infra* pp. 14-15.

Because of his view of the law, Judge Moore did not find it necessary to review the facts in detail. Judges Feinberg and Murphy, who did, came to directly contradictory conclusions. Judge Feinberg's conclusion that segregation was not proved rests upon five erroneous assumptions.

In the first place, Judge Feinberg assumes that the 1961 statute expanded the 17th district in a "logical fashion" (Appendix A, *infra*, p. 21a). This assumption ignores the fact that two areas were inexplicably omitted: the area bounded by 98th and 100th Streets and Fifth and Madison Avenues, with a population 44.5% non-white and Puerto Rican, and the area bounded by 19th and 14th Streets and Third and First Avenues, with a population 12.2% non-white and Puerto Rican. The latter area is more logically contiguous to the old 17th than the adjoining all white non-Puerto Rican Stuyvesant Town (bounded by 19th Street, First Avenue, 14th Street and the East River) which was added. Omission of these two areas results in

five additional zigzags in the boundary of the 17th district,* and their inclusion would have brought the under-sized 17th closer (by 7,489 persons) to the statewide and county-wide average.

Secondly, Judge Feinberg assumes that "many combinations of possible Congressional district lines, no matter how innocently or rationally drawn, would result in comparable figures" (*Id.* at p. 23a). There is no support whatever for this assumption; indeed, the record shows quite the contrary—namely, that short of further reducing the size of the 17th or 18th districts, it would be impossible to create one district with a higher percentage of non-whites and Puerto Ricans and one district with a higher percentage of whites.

Thirdly, Judge Feinberg assumes that only the *changes* effected by the 1961 statute are relevant (*Id.* at pp. 20a-21a). This assumption ignores the possibility, which appellants assert to be the case, that the prior boundaries of the districts were also unconstitutional and that the 1961 changes merely perpetrated and exacerbated that unconstitutionality.

Fourthly, Judge Feinberg apparently assumed that plaintiffs in a case challenging the constitutionality of a state statute have a burden of proof ("difficult burden") which is greater than that imposed upon plaintiffs in an ordinary civil case. That assumption was legally erroneous (see *infra* pp. 15-17).

Finally, Judge Feinberg assumes that proof of legislative "motive" is a prerequisite to unconstitutionality and that plaintiffs must prove such "motive" as part of their affirmative case, even in the absence of allegations and proof

*The reduction in total zigzags, emphasized by Judge Feinberg, results primarily from moving the 17th's eastern boundary over to the East River as part of its expansion required by reduction of the Island's districts from six to four. The upper East Side area thus added had become virtually all-white non-Puerto Rican (97.3%) at the time the 1961 statute was adopted (R. 123-25).

thereof by the defendants. This assumption was also legally erroneous, *infra* pp. 14-15.

Shorn of these erroneous assumptions, Judge Feinberg's conclusion becomes untenable, and Judge Murphy's view of the record must be adopted.

2. Judge Moore's opinion denies that segregated voting districts are unconstitutional absent proof of dilution of voting rights or other specific harm to the persons involved. This view raises an important question of Constitutional law, applicable in segregation cases of every variety. Although the opinion of the court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), noted that placing Negro students in separate schools might be harmful to the students involved, the Court's later decisions outlawing racial segregation in public parks, buses and golf courses were *per curiam* opinions citing *Brown* without a suggestion of specific injury to the individuals concerned. Although two Justices have apparently taken the position that segregated voting districts are unconstitutional, without a further showing of or dilution of voting power*, the issue has not been passed upon by this Court. If Judge Moore's opinion is allowed to stand, the states will be free to erect "separate but equal" voting districts and other governmental units.

3. Judge Moore adopts the intervenor's argument that segregated voting districts may be sustained if they benefit a particular racial group. This "benign quota" argument is in conflict with the decision in *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961), Note, 70 *Yale L.J.* 126 (1960). And see Bittker, *The Case of the Checker Board Ordinance*, 71 *Yale L.J.* 1387 (1962). The "benign quota" issue, which is dramatically presented by

*See Mr. Justice Douglas in *Baker* v. *Carr*, 369 U. S. 186, 244 (1962) and Mr. Justice Whittaker in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 349 (1960).

this case, is emerging as one of the most important in racial litigation of all kinds.

4. The prevailing judges, and probably Judge Murphy as well, assert that a showing of legislative "motive" is a prerequisite to a finding of unconstitutional segregation. According to this view, a state practice or statute which has the effect of segregating persons on grounds of race or place of origin could be constitutionally justified if it were shown, by legislative history or otherwise, that this effect was achieved inadvertently in the pursuit of a different objective. This is indeed a novel doctrine of far-reaching importance in segregation cases of all kinds. If some legislative motives can overcome the effect of racial segregation, can any such motive suffice or only alternative motives which are deemed especially laudable? How does a court divine the legislative motive, especially when, as here, there is no relevant legislative history? Are not legislatures, like individuals, presumed to intend the natural consequences of their acts? And is there not a danger, if legislative motive to segregate must be shown in order to prove a case of segregation, that legislative history will be manufactured, or, as here, avoided, thus leading courts, especially this Court, into the frequent necessity of implying motives or questioning the sincerity of individual legislators' expressions?

The Court below cited no authority for its novel view that plaintiffs, in addition to showing effect, must also show legislative motive. It is of course true that legislative purpose may be relevant when the effect of a statute challenged as unconstitutional on its face may not be shown without reference to legislative purpose, *Bush* v. *New Orleans Parish School Bd.*, 188 F. Supp. 916 (1960), *aff'd*, 365 U. S. 569 (1961). But when effect may be readily proved,

the Court has focused solely on effect without inquiring into the motive of the legislature. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341, 347-8 (1960), where the opinion refers to "effect" and "result" rather than motive or purpose. Where an effect of segregating has been shown, an alleged motive to achieve some other objective has been rejected as irrelevant, see, e. g., *Eubanks* v. *Louisiana*, 356 U. S. 584, 588 (1958) (purpose to preserve "local tradition" rejected). And see *Branche* v. *Board of Education*, 204 F. Supp. 150 (E. D. N. Y. 1962), where purpose was held irrevelant once an effect to segregate was shown.

And in cases where state action has been held to have the effect of abridging the rights of a racial minority under the First Amendment, that action is unconstitutional even if such abridgement was "unintended" and even if the purpose of the action was to protect a very real state interest, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449, 461 (1958); *NAACP* v. *Button*, 371 U. S. 415, 439 (1963).

Nowhere in the cases is there justification for the view advanced by Judge Feinberg in this case that a legislative motive to classify persons according to "social and economic background" could constitutionally justify a statute which has the demonstrable effect of segregating persons by race or place of origin, or Judge Moore's apparent view that *any* alternative motive could justify the statute.

5. Whether or not the Court below was correct in holding legislative motive a relevant factor where plaintiffs seek to prove that a state statute unconstitutionally segregates, it was certainly incorrect in the crucial matter of the standard of proof to be applied in such cases.

As indicated in cases like *Neal* v. *Delaware*, 103 U. S. 370, 397 (1880), *Norris* v. *Alabama*, 294 U. S. 587, 591, 597-98 (1935), and *Hernandez* v. *Texas*, 347 U. S. 475,

480-81 (1954), plaintiffs attacking the constitutionality of state action on the ground that it produces segregation make out a *prima facie* case by showing that such segregation does, in fact, exist—in other words, by demonstrating the effect of the action. It then falls on those defending the action to attempt either to rebut the plaintiff's proof, or to offer some justification for the forbidden effect. Thus in such cases traditionally, as in civil cases generally, 2 *Moore's Fed. Pract.* 1841-62 (1953), matters not within the plaintiff's *prima facie* case are reserved for affirmative defenses which must be pleaded and proved by defendants. Finally, in these cases, as in all civil cases, plaintiffs must prove their case only by a preponderance of the evidence.

The effect of Judge Feinberg's opinion is to alter these rules. His statement that appellants have a "difficult burden" in attempting to prove the unconstitutionality of the challenged statute indicates that he imposed a standard of proof higher than preponderance of the evidence. And the consequence of his unsatisfactory answers to Judge Murphy's question? "What more need plaintiffs' prove?" is to require plaintiffs, in order to be certain of proving a *prima facie* segregation case, to assume the burden of rebutting every theoretically possible motive for the challenged statute, even in the absence of allegations and proof of such motive by defending state officials. The latter is an especially unreasonable burden when, as here, there is no relevant legislative history.*

In the adversary system neither the plaintiffs nor the Court should be obliged to speculate regarding legislative motive, particularly in constitutional litigation in which the resources of the state, which is in the best position to aduce

*In this case the only legislative history is the legislative committee report, Appendix B, pp. 9b-14b, *infra*. Although this report asserts that the committee was motivated by a desire to achieve substantial numerical equality, it contains nothing which would explain the configurations of the Manhattan districts.

evidence of legislative motive, are arrayed against the private litigant. Once the plaintiffs have made an adequate showing, the Court has a right to be informed by the state regarding the basis of the statute, and it may enforce that right effectively only if, in the absence of allegations and proof by defendants, it is prepared to give judgment to the plaintiffs.

6. The judgment below rests upon Judge Feinberg's view that inferences regarding legislative motive, other than that drawn by appellants, are possible. Judge Feinberg cited only one specific example of such an inference: that the challenged portion of the statute is based upon "social and economic background." However, there is nothing in the record regarding the social and economic background of the population of the Island, and such a matter surely is not a proper subject of judicial notice. A rule permitting the Court to speculate beyond the record in order to justify state legislation challenged as creating racial segregation is surely improper and could lead to widespread abuse.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted and a hearing on the merits should be granted.

Respectfully submitted,

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